No. 22656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

I.

The Conviction Must Be Reversed Because the Customs Officials Failed to Comply With the Standards Recently Promulgated to Regulate Intrusive Border Searches.

Counsel for Appellee correctly states in his brief that vaginal cavities are not immune from search under appropriate circumstances. The question raised here is which circumstances are appropriate to justify such a search. The argument posed by Appellee is essentially that the information provided by an undisclosed informer was sufficient to justify the search in this case. The argument lacks force for three reasons: first, the information supplied could only justify searching defendant's personalty; second, the information was not

adequate to justify causing defendant to remove her clothing; third, even assuming the information was adequate enough to justify forcing defendant to disrobe, it was not sufficient to justify compelling her to manually expose her vagina to the seizure clerk.

Before discussing the arguments of Appellee, it is necessary to state the three tests recently propounded in *Henderson v. United States,* Circuit Court of Appeals Case No. 21,190 (9th Cir. 1967). These tests regulate the permissible extent of border searches. The standards vary in stringency depending upon the severity and intrusiveness of the search. The initial standard provides that the mere crossing of the border is sufficient cause for search of a person's baggage and vehicle. The second standard prescribes that if a person is required to disrobe the investigating officers must have "at least a real suspicion directed specifically to that person." *Id* at 4. The last and strictest standard requires in a case comparable to the instant one that there be a "clear indication" that the search will reveal the evidence sought before a woman can be compelled to manually open her vagina for visual inspection.

Under these tests it is unquestionable that the officers were justified in searching the automobile in which defendant was an occupant. However, they were not justified in proceeding further and forcing defendant to disrobe because the facts were not such as to give rise to a "real suspicion" directed *specifically* at defendant that she was carrying contraband. The most infor-

mation the officers were given was that a vehicle which defendant later occupied was parked next to the residence of an alleged lieutenant of a narcotics dealer. No information was given that defendant was seen in the automobile or the house, or that she would be attempting to smuggle narcotics through the port of entry, nor that she was in anyway connected to the occupants or residents of the premises indicated.

On this point Appellee argues that the instant case is distinguishable from *Henderson*. The government asserts that the kind of information necessary to justify an intrusive search of a body cavity was absent in *Henderson* but present here. This is not a salient argument. The court in *Henderson* pointed out that the customs officers had not received any information about the automobile in which the defendant was riding, the driver, or the defendant. The only difference between the cases is that here the automobile had allegedly been seen by an undisclosed informer. Nonetheless, this is still not sufficient information to generate a real suspicion directed specifically toward defendant that narcotics were being smuggled across the border by her. It— at most—would substantiate a search of the vehicle and baggage. Therefore, defendant should not have been required to disrobe.

Even assuming that the facts were sufficient to justify requiring defendant to disrobe, they were inadequate to create a clear indication to the seizure clerk that defendant had secreted drugs and that the search would

disclose them if she were made to expose her vaginal cavity. The clear indication test means that there must be a high probability that the search will be fruitful before it can be conducted. It is axiomatic that no high probability of success existed in the case at bar. No specific information was obtained prior to the time defendant was forced to disrobe that she had concealed narcotics in her person. Moreover, by the time defendant was requested to expose herself, the seizure clerk had conducted an examination of defendant's person and clothing and had found nothing. This singular lack of evidence, contrary to Appellee's position, should have vitiated any prior suspicions the officers had. Nothing beyond caprice existed upon which to base such a humiliating search.

Respectfully submitted,

NORMAN J. KAPLAN,
Attorney for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN